Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

79-1693

No.:_____

JOSEPH A. MARINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 16, 1980

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph A. Marino respectfully prays that a writ of certiorari issue to review the summary judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 17, 1980.

Opinion Below

The judgment of conviction was affirmed by summary order. That order and the memorandum opinion appear in the appendix hereto at page 1a. No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a witness' hearsay declaration, in the form of a prior consistent statement, was properly admitted.

2. Whether the courts below erred by not granting an evidentiary hearing to resolve the issue of whether the Government's case was tainted by the use of illegal evidence.

Statutory Provisions Involved

1. United States Constitution, Amendment IV. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

2. Federal Rules of Evidence, Rule 801

(d) A statement is not hearsay if

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

Statement of the Case

I

Petitioner was convicted, after trial by jury, of one count of aggravated bank robbery in violation of Title 18 U.S.C. § 2113(d) and one count of transporting stolen money in interstate commerce in violation of Title 18 U.S.C. § 2314 in the United States District Court for the Eastern District of New York. (Weinstein, J.) As a result of this conviction Marino was sentenced to a combined prison term of twenty-seven and one-half

years. The evidence adduced at trial showed that on December 19, 1978 a group of armed robbers forcibly stole more than two million dollars in cash from a Wells Fargo armored truck in Staten Island, New York. The Government's proof connecting Petitioner to the robbery consisted of three categories of circumstantial evidence; only one now being relevant to this petition.

While there was no in-court identification of Petitioner, the Government sought to introduce proof that two fingerprints found on the steering wheel of the armored truck were identical to the print of Marino's left ring finger. The introduction of the prints, contained in Exhibit 10, however, immediately sparked a controversy. The officer who lifted them testified that Exhibit 10 consisted of the last of six lifts taken from the steering wheel of the armored truck. He further stated that he had written the numeral six and the word "wheel" on the exhibit as introduced. However, defense counsel claimed that weeks before the trial his law partner and a defense-retained expert had examined the exhibit and the word "wheel" did not appear. Adding to the confusion was Officer Shanley's (the officer who lifted the prints) admission that he had not followed standard procedure in that he did not photograph the latent print on the steering wheel, before removal.

In response to defense counsel's attack on the procedure involved and the question raised as to when "wheel" was actually written on Exhibit 10 the Government put on a rebuttal case. The officer, Levin, who displayed Exhibit 10 to the defense team during a pretrial discovery meeting, testified that both the number six and the word "wheel" appeared at that time. Further, the Government called two FBI agents through whom three more exhibits were entered into evidence. These

exhibits, 45-47, one transmittal document and two photographs of Exhibit 10, according to the two agents were received by the FBI on January 19, 1979, one month after the robbery. One agent further testified that the photographs were identical to the Exhibit and that the word "wheel" appeared on both.

II

Relevant to Petitioner's second issue presented by this petition was the Government's refusal to unseal the affidavits in support of the warrant issued allowing a search of Petitioner's home. Because of the Government's reluctance to identify the informants who supplied the information contained in the search warrant affidavit, a tactical decision was made not to utilize any of the evidence seized pursuant to the warrant. The Government made its position clear numerous times before the court as well as by letter dated August 27, 1979 where it stated that it "will not introduce any evidence at trial that was seized as the result of the execution of a search warrant."

Defense counsel challenged the unsworn, naked denials made by the Government at various times both before and during trial. In this regard it was argued that the Government's reliance on proof of large cash expenditures by Petitioner derived from the search of Petitioner's home since some of the purchases sought to be proved could not have come to the Government's attention absent the use of documents found during the search. In response the Government asserted that the information was obtained from telephone toll records furnished in reply to Grand Jury subpoenas.

In one instance defense counsel pointed out that a travel agent who booked Petitioner on a trip to Mexico was not interviewed until some time after the search

in question. A request for independent source of proof resulted in the explanation that the telephone records led to the agency. Also on the basis of what had been shown by the timing of the interview with the travel agent, defense counsel asked that the Government establish an independent source of proof concerning Petitioner's purchase of a home in Florida, a Cadillac and a boat. The court declined to inquire further and found the Government's assertion that the proof was not tainted as "enough".

REASONS FOR GRANTING THE WRIT

I

The Word "Wheel" on Exhibit 10 Was Inadmissible Hearsay; Exhibits 45-47 Were Also Inadmissible As Hearsay Evidence.

It is well settled that absent an applicable exception hearsay evidence is not admissible. Petitioner contends that the word "wheel" found on Exhibit 10 had but one meaning. It is as if it had said that "I, Officer Shanley, took this latent print from the steering wheel of the armored truck." Being such, it was error to admit it into evidence since it was an out-of-court declaration which unfairly bolstered Officer Shanley's testimony.

Because of the admission into evidence of the word "wheel" on Exhibit 10, the issue degenerated into when the word was applied to the print. It is Petitioner's position that the introduction of Exhibits 45-47, offered to rebut the contention that the prior consistent statement ("wheel") was not a recent fabrication, was a distortion of the prior consistent statement rule found in 801(d)(1)(B) of the Federal Rules of Evidence. What the Government sought to do was to improperly bolster a witness' testimony by a prior

consistent statement as well as give additional testimony to rehabilitate the statement once the defense attacked the prior consistent statement.

Contrary to the trial court's initial finding that Exhibits 45-47 were relevant only to the issue of credibility, it is more likely that the jury misused the evidence despite a limiting instruction. Petitioner asserts that the writ should be granted since the Court of Appeals erroneously affirmed this ruling finding that the limiting instructions were appropriate under the circumstances. Moreover, these exhibits, once determined to be hearsay, could not be admitted under any other exceptions. *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) ("police reports" held inadmissible under either Rule 803(6) or (8)).

II

The Trial Court's Refusal to Grant an Evidentiary Hearing on the Issue of Taint Was Erroneously Affirmed by the Court of Appeals; Petitioner's Fourth Amendment Rights Were Potentially Abrogated.

As explained *supra* in the statement of the case, counsel for Petitioner unsuccessfully attempted to either examine the affidavits in support of the search warrant or hold an evidentiary hearing to determine if the Government in fact had an "independent source" for its evidence. Petitioner claims that the Second Circuit's finding that he "failed to meet his 'initial burden of providing specific evidence demonstrating taint in a substantial portion of the Government's case against him.' *United States v. Sapere*, 531 F.2d 63, 66 (2d Cir. 1976)" did not appropriately account for the evidence Petitioner did present. Briefly the evidence submitted in support of his burden is as follows: (1) Because of the refusal to turn over the affidavits the search was presumably illegal; (2) a number of

documents were taken from Petitioner's home; (3) the "substantial proof" here involved, the cash expenditures, is the type of evidence which is often derived from personal documents; (4) the proof at trial showed that it was not until *after* the search that federal agents interviewed the travel agent.

Thus, this writ should be granted so as to conform this case to already existing law that requires evidentiary hearings to determine whether evidence unlawfully gathered by law enforcement officials has found its way into the prosecution of a criminal case. *United States v. Bianco*, 534 F.2d 501 (2d Cir. 1976); *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976). *See* also *United States v. Birrell*, 269 F.Supp. 716, 727-729 (S.D.N.Y. 1967) and *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 1057 (1978).

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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April 16, 1980

APPENDIX

Appendix A

Opinion of United States Court of Appeals
Dated March 17, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Docket No. 79-1405

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of March, one thousand nine hundred and eighty.

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
Circuit Judges

HONORABLE CHARLES P. SIFTON
District Judge

UNITED STATES OF AMERICA,
Appellee,

-against-

JOSEPH MARINO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Appendix A

Opinion of United States Court of Appeals
Dated March 17, 1980

Joseph A. Marino appeals from a judgment of conviction, entered after a jury trial before Judge Jack B. Weinstein in the District Court for the Eastern District of New York, for bank robbery, in violation of 18 U.S.C. § 2113(d), and interstate transportation of stolen money, in violation of 18 U.S.C. § 2314. Appellant was sentenced to 20 years imprisonment on the bank robbery count and to seven and one-half years imprisonment on the interstate transportation of stolen money count, the sentences to run consecutively.

Appellant argues that the trial court erred by admitting into evidence Exhibit 10, a fingerprint lift labelled "wheel." Although appellant now claims that the word "wheel" is inadmissible hearsay, he specifically declined to make such a claim below. Accordingly, this objection has been waived. See *United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978). Even had such an objection been raised below, it would have been proper to admit this evidence. The word "wheel" was not itself a statement barred by the hearsay rule, but was instead merely a mark, like a letter or number, that allowed the government's fingerprint expert to identify the lift he previously had made. *Cf. United States v. Burket*, 480 F.2d 568, 571 (2d Cir. 1973). Under these circumstances, we need not consider the government's alternative theory that this evidence came within the public records exception to the hearsay rule. See Fed. R. Evid. 803(8).

Appellant also complains of the admission of Exhibits 45, 46 and 47, consisting of a FBI routing slip and two photographs. However, appellant opened

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the door to the introduction of this evidence by his attempt to prove that the government had tampered with Exhibit 10. Judge Weinstein admitted these documents on the issue of credibility of various government witnesses only, and he gave appropriate limiting instructions. We therefore need not pass on the question whether, as seems likely, these exhibits were in any event admissible either as non-hearsay items or as items coming within an exception to the hearsay rule.

Appellant next contends that he was denied effective assistance of counsel in that trial counsel triggered the damaging introduction of Exhibits 45-47 by incompetently attempting to prove that the government had tampered with Exhibit 10. There is nothing to this claim. Counsel's attempt to prove tampering was simply trial strategy; if it had succeeded, this appeal would not be before us today.

Finally, appellant submits that at the very least this case should be remanded for an evidentiary hearing to resolve whether the government's case was tainted by evidence seized during an illegal search. No such hearing was requested in the district court, however, and in the absence of such a request no hearing was required on these facts. In any event, appellant failed to meet his "initial burden of producing specific evidence demonstrating taint in a substantial portion of the Government's case against him." *United States v. Sapere*, 531 F.2d 63, 66 (2d Cir. 1976).

Appendix A

Opinion of United States Court of Appeals
Dated March 17, 1980

The judgment of conviction is affirmed.

/s/ Henry J. Friendly
HENRY J. FRIENDLY

/s/ Wilfred Feinberg
WILFRED FEINBERG,
Circuit Judges

/s/ Charles P. Sifton
CHARLES P. SIFTON
District Judge